

Minutes
WARRICK COUNTY AREA BOARD OF ZONING APPEALS

Regular meeting to be held in the Commissioners Meeting Room,
Third Floor, Historic Courthouse,
Boonville, Indiana
November 13, 2018 at 6:00 P.M.

PLEDGE OF ALLEGIANCE

MEMBERS PRESENT: Jeff Valiant, Chairman; Terry Dayvolt, Doris Horn, Paul Keller, Jeff Willis, and Mike Winge.

Also present were Morrie Doll, Attorney, Molly Barnhill, Assistant Director, Kim Kaiser and Katelyn Cron, staff.

MEMBERS ABSENT: Mike Moesner

BZA-SU-18-19 AMENDED

OWNER & APPLICANT: American Land Holdings of Indiana LLC by Chad Sullivan, Attorney

PREMISES AFFECTED: Property located on the S side of Holder Hill Rd. approximately 0 feet SW of the intersection formed by Holder Hill Rd. and Weyerbacher Rd. Hart, Greer, Campbell, and Boon Townships.

NATURE OF CASE: Applicant requests a Special Use, SU-13, from the requirements as set forth in the Comprehensive Zoning Ordinance in effect for Warrick County, IN to allow Mineral extraction in a Flood Hazard area as adopted by ordinance effective August 2, 2012. The application has been amended to remove the 109 acres owned by Mark Hendrickson (Advertised in the Standard September 13, 2018). *Continued from September 24, 2018 and October 22, 2018*

Present were Chad Sullivan, Attorney for American Land Holdings Inc., Matt Pearson, General Manager at the Summerville and Wild Boar Mines for Peabody, Mike Englman, Engineer Manager for Peabody, Andy Nelson, Permit Manager for Peabody, Mark Hendrickson, Mark Miller, Attorney for Mark Hendrickson, and Jonathan Danks Attorney for Mark Hendrickson.

Mrs. Barnhill stated that we have all of the green cards except for three. She said the cards from Alcoa Fuels and American Land Holdings of Indiana LLC show being delivered on the USPS website but the green cards were never received. She said the letter from Karen Robinson ETAL had been returned to the original sender. She said they were mailed correctly and we had all of the white pay receipts. She stated was the zoning for the property was "A" Agricultural and "CON" Recreational and Conservancy. She added there was one residence and an existing tower on the property but the rest was vacant. She stated all of the surrounding properties were zoned "A" Agricultural and are vacant. She said there was a small amount of the property in the flood zone A, which was the only reason this application was being heard tonight. She stated if the property had a LOMA from FEMA, the Board would have no jurisdiction on the mining. She said the mining area would cover approximately 2,744 acres after the removal of the 109 acres owned by Mr. Hendrickson with less than 50 acres in the flood zone A. She stated the application was in order.

Chairman Valiant said to Mr. Sullivan he assumed he had a presentation.

Attorney Sullivan replied he did and would try to be as brief as possible but he did have a presentation. He said he did have a map in each of the binders (he had handed out before the meeting) about the property that he was talking about. He stated they were a little large in size so he doubted they could all put them out in front of them but they do have them if they want to look at them. He said it describes and shows the property that is an issue tonight. He said they would see towards the southern end of the map that they did carve out Mark Hendrickson's property. He stated it was the white section that is kind of in the middle of the southern portion of the yellow section. He said the yellow section is the portion in the application area. He stated that Mark Hendrickson's property makes kind of an L. He said their amended application exempts that out so they were no longer seeking to permit Mr. Hendrickson's property. He said the Special Use permit that they were asking for was for mineral extraction there was no urban area, which was one area of jurisdiction for the Board. He stated there were two small areas that had been deemed flood hazard areas, if they look at the southern portion, they would see the blue fingers that come up he would call that the southern flood hazard area. He said that was a topographical map so you would see the elevations. He said the southern area now being at 450 feet was above the BFE for flood hazard; however, when they looked at the LOMA situation the timing didn't really lend itself for them to get a LOMA on the southern portion. He said they could see from the map that it was above the Base Flood Elevation. He stated there was another small flood hazard area in the northern portion, it was a very small little finger area towards the northeast section of the map. He said they probably couldn't get a LOMA on that but the timing situation was the same on it too. He stated both of those areas were not areas designated for extraction; there would not be mining of coal in those two areas. He said they are not designated extraction areas but they were within their permit for the DNR. He stated actually those areas had been mined out previously; in fact really surrounding this entire area had been previously mined. He said their contention for the Board's jurisdiction was the flood hazard issue. He stated it had already been looked at by the DNR, he's sure most of them were aware that they had obtained the proper mining permits from the Department of Natural Resources. He stated for them to obtain that permit they had to address any concerns they had with flooding. He said he was sure they were all aware the DNR process was an extensive and arduous process that has many layers to it. He said to give you a flavor, not by any means to show you everything the DNR looked at, he had included some of the materials in their binders that showed the process the DNR went through. He stated if they would look at tab five in their binders, the page that was numbered five at the bottom, shows all of the agencies that participated in the DNR process; the US Fish and Wildlife, Indiana Bureau of Mines, US Army Corp of Engineers, Indiana Department of Environmental Management, Office of Water Quality, Warrick County Commissioners, Warrick County Library, AFLCIO. He said all were part of the process of issuing the DNR permit. He stated more specifically to the hydraulic issues and the flooding issues if you look at page eleven of the same tab they would see a summary of department findings, so after this entire process the DNR found at paragraph C said that the applications had been designed to prevent damage to the hydraulic balance outside the proposed permit area. He said they also found in G the interest of the public and effective landowners would be protected by the proposed mining operation. He stated on page thirteen of the same tab they would see numerous findings on that page, if you look at particularly T, U, and V they all go to flooding ground water, it talks about two of the creeks, it shows that the DNR made specific

findings about the mining operations effect on the waterways and floodways. He said he would also like to point out during this DNR process Mr. Hendrickson was involved. He stated in the process he had notice of the permit application, he participated in the permit application, and had the opportunity to voice his concerns and have the concerns addressed by the DNR. He said they said all of this because it was their opinion that the Board should defer to the expertise of the DNR that has looked with great specificity at the issues that were raised by Mr. Hendrickson, both in the DNR process and what he was raising again before the Board. He stated he knew there were factors in the Board's ordinance, six factors in particular; that they say the BZA was to look at for these types of requests. He said the first one was whether the specific site was an appropriate location for use and they submit that this area had been mined basically all around and was agricultural as it was now it was a perfect location for mining. He stated the second factor was whether the use as developed would adversely affect the surrounding area; again, the surrounding area was mined out land so he felt that factor weighs in favor of the applicant. He said whether there would be a nuisance or serious hazard to vehicles, pedestrians, or residents. He said he thought the Board heard in the initial report and would see on the map that there was only one residence both in the permit area and the adjoining area, it was a mobile home and it was his understanding that the resident would be moving out before any mining occurred so they wouldn't be dealing with any residents in the permit area once mining began. He stated that whether adequate or appropriate facilities would be provided for proper operation. He said he was sure they were aware that the coal mining industry was heavily regulated as any industry in the state and was governed by MSHA (Mine Safety and Health Administration) and various other state and federal agencies that were designed to make sure that the coal mining operations are proper. He said whether the use was in harmony with Warrick County Comprehensive Plan and whether the use essential or desirable public convenience and welfare; both State public policy and Warrick County had a strong policy in favor of extraction of natural resources and the production of natural resources. He stated Warrick County's Plan specifically talked about economic development, this would obviously be an economic source of development and would provide numerous jobs for a period of time. He said he had the General Manager, Matt Pierson, with him today that would give the Board a little more detail on the jobs and the length of this mine. He stated the economic development was part of the purpose of the ordinance. He stated all six factors weigh in favor of approving the application. He said he wanted to touch briefly on Mr. Hendrickson's actual objection. He stated initially he would say the things he brought up in the objection weren't factors that were proper for the Board to weigh in approving this petition but in order to give the Board some comfort that if the Board did even consider them they wouldn't weigh in favor of denying this petition. He said the first point he brings up in his objection was he was concerned about his ingress/egress to his property: one he could tell them they can't and won't block his ingress/egress. He stated if they have the map in front of them, they could see the property he owned. He said there were two little strips that showed the property that he owned and was the road into his property, again there was nothing in the mining operations that intended to block his ingress/egress in fact the law wouldn't allow them to land lock him. He said he would state that wasn't a valid concern. He stated he referred in his objection about business. He said that was a business that frankly he hadn't found any advertising, web presence, or anything else. He stated this land was zoned "A" Agricultural property so he wasn't sure what the business was, nonetheless if they did a weighing of the factors they would submit that the economic development that would come from this mine would grossly outweigh whatever the business the Big Ditney Recreation had ongoing. He said if this permit were not approved it would affect people other than American Land Holdings

Inc. or Peabody as most everyone referred to them. He said there were multiple landowners on that map inside the permit area. He stated those land owners had leases or agreements where they would be paid royalties. He said they had one of the landowners there, Mr. John Weyerbacher, who was there in support that if the Board denied the application he wouldn't get his royalties, he wouldn't get the benefit of the bargain that he made with Peabody. He stated he thought when they weighed all of those things together again that the scales tipped heavily in favor of approving the application. He said the last concern of Mr. Hendrickson's referred to endangered species; again, the DNR spends much time in reviewing. He said to give you just a flavor of what they had done if you look at tab five pages six through nine all talk about endangered species, the required participation by the US Fish and Wildlife Service, and there was a specific protection enhancement plan that was put together by his client and approved by the DNR. He stated on page eight it referenced that there were no critical habitats to any listed endangered species. He said specific findings by the DNR that any concerns or issues about endangered species were satisfied by the coal mines permit and operations. He stated in light of all of that they submit that all of the things that the Board was to consider to approve a petition for special use had been met by the petitioner that the objections set forth by Mr. Hendrickson are not valid means to deny the petition. He said he had brought numerous representatives from the company that have more technical expertise than himself so if the Board had any specific questions they were there and prepared to answer them. He said with that he would like to give Mr. Pierson a minute or two to talk about the economic impact of the mine unless they had any questions from him before he speaks.

Chairman Valiant asked the Board if there were any questions.

Matt Pierson stated he was the General Manager at the Summerville and Wild Boar complex and he would like to thank the Board for taking time to hear their proposal tonight. He said to give the Board a few facts the Summerville and Wild Boar complex employs around 350 employees directly with Peabody and most of those people live in and around the Boonville area. He said indirectly they employ several hundred contractors that also support the operation, which gives a direct and positive economic impact to the community. He stated they hoped to continue that for a long time coming. He said the area they have proposed for rezoning added approximately ten years to the mining reserve on top of what they already have permitted. He said that would continue to inject that economic benefit into the community for an additional ten years.

Terry Dayvolt asked how many years did he think this would go. He said you said ten years this is 2018 so 2028.

Matt Pierson stated on top of their current reserve it would be 2030 was where it would take them.

Attorney Sullivan stated if there were no other questions from the Board that would conclude their presentation, which they respectively submitted that you approve the petition for a Special Use permit.

Mike Winge asked on the plat map that you gave us taking that this was the water area here.

Attorney Sullivan stated yes, the blue crosshatched sections were designated flood hazard areas.

Mike Winge asked and you aren't mining that.

Attorney Sullivan stated that would not be an extraction area in the southern portion.

Mike Engleman stated he was the Engineer Manager at the complex. He said without control of Mr. Hendrickson's property they wouldn't be able to extract coal in that lower section there.

Chairman Valiant asked what was the number of jobs.

Attorney Sullivan replied directly they employ 350 people at Peabody and indirectly several hundred contractors support the mine site.

Chairman Valiant asked if they would be adding to that.

Attorney Sullivan replied no they would just be continuing those jobs.

Chairman Valiant asked if there were any remonstrators for or against.

Attorney Miller, attorney for Mark Hendrickson, stated he was going to make a brief opening statement then he had someone else to do the presentation on their behalf and then some comments from Mr. Hendrickson. He said he wanted to make sure Mr. Doll that the petition for review that they had submitted to the Area Plan Commission was included in the packets for the Board of Zoning Appeals.

Attorney Doll asked if that was the objection of remonstrators.

Attorney Miller replied their objection but before the last hearing, they submitted a petition for review that he and Attorney Doll had discussed. He said Attorney Doll had asked that they submit any materials that they intended to present at the hearing in advance and he was simply asking if that document was included in the packets for the members for the Board.

Attorney Doll stated he thought it was previously but he didn't think it was in tonight's packet.

Mrs. Barnhill asked if it was the original objection.

Attorney Miller and Attorney Doll replied no.

Attorney Miller stated he had a copy that he would be happy to provide to them.

Attorney Sullivan stated he thought they had included it in their binder at tabs 13 and 14 if he wanted to verify that was what he was talking about.

Attorney Miller stated that was the other preliminary matter.

Attorney Doll stated he didn't see a tab 13 or 14.

Chairman Valiant stated he didn't have a 13 or 14 either.

Attorney Miller stated that was another matter that he would like to draw to the attention of the Board. He said at the request of the Boards council they took great pains to submit materials in advance of the meeting so the other side would have an opportunity to review them and be prepared to respond to them. He stated he still had not seen a copy of the binder that was sitting in front of them. He said not even tonight were they given a copy to follow along with the members of the Board and they would note that they objected to that proceeding in that manner as they understood that procedure would be otherwise, as he had outlined. He said his last preliminary comment was that Mr. Sullivan said something, which to a certain degree he agreed with and that was that they should defer to the DNR, Department of Natural Resources. He stated he was going to give them something they just received late today that the other side didn't have but he would give them a copy.

Attorney Doll said Mark we had this in the binder. He said it was the original objection filed in September.

Chairman Valiant asked if that was what he was looking for.

Attorney Miller replied no.

Attorney Doll stated he didn't know what all was included in the collection.

Attorney Miller stated it was a petition for review Mr. Doll that they filed with the Natural Resources Commission with the Department of Natural Resources.

Attorney Doll said yes.

Attorney Miller said that was what he had asked if it was in the Board members packets.

Attorney Doll stated he did not see it. He said let us talk here a second.

Attorney Miller stated if he might finish. He said what he wanted to give in addition to that was in response to that petition the Indiana Natural Resource Commission had set a hearing to consider their objections that were made. He said Mr. Sullivan said the Board should defer to the DNR's decisions. He stated they asked the Board to do that but only after the DNR had made their final ruling. He stated the presentation would show how Peabody had amended this permit in numerous ways without public notice to anyone. He said that was the subject of that petition and this notice from the Indiana Natural Resources Commission. He stated Mr. Doll thank you for indulging him and he would be happy to answer any questions.

Attorney Doll replied no, they wanted to get the record right. He said she would copy it and they would distribute it to everyone this evening to make sure.

Attorney Miller asked if there were any questions for him.

Attorney Doll stated to be specific Mr. Miller what you said was that you felt the Board should not rule tonight on SU 13 application because the DNR had not granted final approval of the application for the mining permit.

Attorney Miller stated he wanted to be very clear there was a final approval for the mining permit in 2015, however since that time there have been five what were classified as not significant revisions to the permit. He said those revisions changed numerous aspects of the permit which included issues that related to where the mining would occur. He stated the mines engineer, he thought was who said that or operations manager, said now that Mr. Hendrickson's property was outside of the mine permit area and now that that had happened, and they couldn't mine south of Mr. Hendrickson's property. He said the presentation would show that was their plan currently but there was no amendment. He said there was nothing with the DNR that said they would not mine through Mr. Hendrickson's property. He stated that was depicted in that petition and that was why they had filed for relief with the Indiana Natural Resources Commission and they granted them a hearing.

Attorney Danks, attorney for Mark Hendrickson, he said if he could approach he had some literature to handout but don't worry he wouldn't ask them to read it now but it did have some pictures that he wanted the Board to get a look at. He said he would ask them to read the outline and they could hold onto that if they did decide to take the matter under advisement and not decide on the matter tonight. He stated he would like to draw their attention, for the time being, there should be a stapled packet of maps included in what he had handed them. He said the first map showed, he believed a smaller version of the map they had viewed tonight and as you would see Peabody had attempted to almost with an exacto knife to take out Mr. Hendrickson's property in an attempt to undermine the standing in today's proceeding. He stated if he could draw their attention to the fourth map given. He said that was currently the map that had been approved by the State of Indiana and on that map; you would see that where the number 36 was at was where Mr. Hendrickson's property was located. He stated on the map that had been approved by the State of Indiana Peabody planned to mine directly through Mark Hendrickson's property. He said the map that you were given tonight by Mr. Sullivan was not legally binding. He stated if the Board were to approve a special use permit based on that map, they were aware of no law that could hold them to conduct the mine according to said map. He said the controlling document, to their understanding, would be approved by the State of Indiana. He stated that the fourth map, where it was scheduled to mine through Mr. Hendrickson's property was the current map. He said it was not the original map that Peabody submitted to the State. He said the third page would show a similar map. He stated on that map the red arrows would indicate the direction of the mine and it appears to go around a large red area. He said that was the area that Mr. Sullivan referred to as the PEP area. He stated it was an area of over 500 acres as an area to be preserved for the endangered species to Warrick County and specifically to Ditney Hill. He said the DNR when they approved the permit viewed that map in which over 500 acres were specifically set aside for endangered species. He stated since that time they have amended the permit to what was the then fourth to mine completely through the area that had been set aside for endangered species directly through Mr. Hendrickson's property. He said that was the subject of the litigation and the hearing with the Natural Resources Commission. He said they had seen that Peabody was willing to submit one set of information to government authorities in order to gain approval only to turn around and change it to fit their profit motif. He stated that Mark Hendrickson was concerned that that was

exactly the motivation for the map that they have submitted to you tonight. He said by attempting to carve out Mr. Hendrickson's property they have not submitted any revisions to the permit with the State agencies. He stated if that map were to be approved, there was nothing to stop them from mining as they said they would to the State of Indiana. He said furthermore, depending on the outcome of the hearing with the Natural Resources Commission the mine map may further change, it was still subject to revisions, it was not a final map even the one submitted to the State now. He stated one of the provisions they would raise with the Indiana Natural Resources Commission was because of the multitude of changes that had happened over time new environmental studies were required to determine the safety of the mine itself. He said right now they could not be certain that toxic waste would not make its way into the waterways of Warrick County. He stated currently there was a proposed mine immediately adjacent to High Point Mine, the Seven Hills Mine. He said they had currently submitted an objection with the appropriate State agencies raising concerns that a broad cumulative impact assessment needed to be done because both mines in totality could present dangers that separately they may not present. He stated they believed they had valid legal grounds for request and the law demanded that this cumulative impact assessment be done to determine if the mines in conjunction would in fact meet acceptable standards and protections for water falling. He said at this time that had not been done. He stated if the Board proceeded tonight, they would approve the petition on an inaccurate map that hadn't been finalized and without studies that guaranteed the safety of Warrick County residents. He said they asked the Board either to deny the application tonight or to delay the vote until the rest of the permit had been finalized. He stated that Peabody had updated its permit with the State to reflect the information that they had provided the Board tonight so that Warrick County and the Board had an accurate transparent information on which to base their decision. He said also that all environmental studies be conducted according to law and be completed so everyone could be sure that their water wouldn't be tainted by the toxic waste that this mine would generate.

Attorney Doll asked if they realized that this was an amended application that had been submitted by Peabody to the Board. He said the Board's general motion to approve a special use contained language that said and he quote *"and the application is approved in accordance with the application and plans on file subject to the following conditions"* He stated the Board starts with the consideration of an application that was on file. He said he agreed that the original application by American Land Holdings of Indiana LLC contained Mr. Hendrickson's property but the amended application that was before the Board tonight had been verified by the Planning Commission staff to no longer contain Mr. Hendrickson's property was that accurate.

Mrs. Barnhill replied yes.

Attorney Doll stated that what had happened was with the amended application they had, this lengthy legal description that was filed on August 13, 2018 which would have included, he thought, Mr. Hendrickson's property for 2,853 acres plus or minus. He stated what had been filed since then was an exhibit and the exhibit was one page, it wasn't marked as exhibit A, B, C, or D, but it was filed on October 31, 2018. He said it consisted of what had been verified by their staff to be Mr. Hendrickson's real estate. He stated if the Board acted on the amended application it was clear what they would be granting a SU 13 for was not the map that might be approved by the DNR in the permitting application process in Indianapolis. He said the Board would only be approving, if that were their wish after they had considered all of the facts, the granting of the

Special Use required by Warrick County Ordinance in the cases of either urban area or flood plain issue as that property was described in the application. He stated tell us how it was relevant that the map had not yet been amended in Indianapolis to conform to what the SU 13 was here in Boonville tonight. He said it seems to him the applicant cannot mine this property until they have an approved permit from DNR. He stated considering all of the factors and all of the issues that DNR goes through, which frankly were not in the purview of this Board. He said they were not equipped to decide about habitat for endangered species, they didn't have the expertise, the staff, or the resources to do that. He stated the Board had six criteria that they consider by their ordinance that was what they were vested with the authority to do. He said the applicant must go to Indianapolis and get their permit from the DNR but they then must come to the Board in the two categories of an urban area or a flood plain to get a Special Use under our ordinance to conduct mining activity in Warrick County. He stated if those two areas didn't match each other he guessed in the area like a ven diagram where they overlap they could conduct mining activity. He said if they get an approval in Indianapolis for one map and an approval from the Board in the two areas that they match they could conduct mining activity. He stated in the areas that they don't match should Indianapolis approve a map that had Mr. Hendrickson's property involved or included, which would be unfortunate, they still couldn't mine there even if this Board approved the SU 13 application and vice versa. He said if this Board excluded that area regardless of the fact that they not get a permit from DNR they can't mine in Mr. Hendrickson's property because the Board cut it out and didn't give them a SU 13. He stated tell him why the Board had to wait, he understood their desire, but why wait to see what DNR did or did not do before the Board approved the SU 13. He said based upon the fact that that ground was clearly excluded now and the maps don't necessarily have to match DNR's for one of them to approve the other. He asked why the Board had to wait.

Attorney Danks stated it would be prudent for this Board to wait because when a permit was revised it could go into two categories significant or non-significant. He said a significant revision required multiple further environment safety studies to be done on the overall permit. He stated it was really to make it a little simpler, they didn't have to start over but they go back and really check all of the environmental concerns based on the new area. He said right now the areas didn't match when they go to the State and revise their permits the State would then determine it had been a significant revision and therefore they needed to check to make sure, that such things as toxic materials wouldn't enter waterways or local wildlife wouldn't be harmed. He said they go back and check all of those things. He stated if the Board were to approve now they would actually have stepped in front of the State where then the State could come afterwards and say hold on they had significant environmental concerns based on those changes.

Attorney Doll stated the State could address those in how they approved a permit, in how they modified a permit, how they conditionally approve a permit, or whether they deny the permit. He said what the Board didn't have there was a criteria number seven that said how did this affect the public environment. He stated he wasn't trying to be difficult he was trying to understand the bases for the delay. He said the Board had six criteria and just to repeat them again what this Board had to decide was whether the requested use was an essential and desirable to public convenience and welfare. He said maybe you could argue welfare encompasses environmental impact, he didn't know. He stated secondly that the use was in harmony with the land use planned for Warrick County, which clearly it was. He said Warrick County was a mining county and had

been for decades or generations and it was included in their plan. He stated that the use was not a nuisance or serious hazards to vehicles, pedestrians, or residents. He said the Board had heard there was one resident but we had not heard that it was going to interfere with traffic patterns or roadways in the County and he didn't know how many pedestrians walked out there. He stated so far they hadn't heard any evidence.

Attorney Danks stated that Mr. Hendrickson would address that.

Attorney Doll replied okay. He stated that the use as developed would adversely affect the surrounding area. He said that the adequate or appropriate facilities would be provided by proper operation of the use. He stated that a specific sight was appropriate for the use. He said all he was saying was the only authority that the Board had, as their counsel he would advise them to look at those six criteria's and apply them to the application. He asked could they delay it. He stated sure they could if they felt like that was appropriate but the Board couldn't decide environmental issues. He said they didn't have staff, scientist, or expertise. He stated nor could they decide endangered species or any of those issues because they didn't have the same thing staff, expertise, or even the statutory authority to do that. He said they had to rely on DNR in Indianapolis to consider those. He said he wasn't pre-judging whether they would prevail or not in Indianapolis because they might have great meritorious arguments. He said it was just not that the Board could decide those arguments was what he was saying. He stated the only question, it seemed to him, was whether they could convince the Board that under those six criteria's they should delay the decision on the SU 13 or not. He said he wanted to make it clear as counsel, if they approved the described territory as an SU 13 here and that was different than was ultimately permitted by the DNR, they couldn't mine that here they could only mine what the Board approved as a SU 13 so long as the Board understood that.

Mike Winge asked Morrie, he stated a while ago that DNR had already been involved for the land and all of the other stuff they had on their reports so that shouldn't affect this decision that way even if...

Attorney Doll said the contention Mike was there had been changes in the maps, plans, and mining activity that had been described by the applicant to the DNR over a five-year period of time. He stated it was approved five years ago apparently...

Attorney Sullivan stated it was three years ago.

Attorney Doll replied thank you. He said it was approved previously and now it had changed and their argument was don't approve the SU 13 because what was before the DNR in Indianapolis was different from what was approved three years ago. He stated the application the Board had here originally was what was approved three years ago, the 2,800 acres was what was approved three years ago. He said now it was not, now it had Mr. Hendrickson's property carved out of that. He said he didn't see where if this Board acted tonight, he wasn't prejudging it he was just saying to his clients; he didn't see where this prejudice was their argument before DNR.

Attorney Miller stated they weren't arguing that Mr. Doll.

Attorney Doll replied okay, because that was a different set of arguments before DNR.

Attorney Miller stated there were several things, he did believe but would conclude on this point later, he did believe that the other standards of the ordinance were met by their objection that there was an environmental issue there, as they explained in their submissions. He said there was a concern to the surrounding area as they explained in their submissions. He stated he also wanted to point out something that hadn't been drawn to their attention yet that he thought was also significant. He said focusing on that part of the Board's jurisdiction, which related to flood hazard areas. He stated the flood hazard area that was in their map, you could look at their map or the first map in their handout, that was most closely associated with Mr. Hendrickson's property.

Attorney Doll stated that southern part there.

Attorney Miller replied that southern flood hazard area. He stated a portion of that same flood hazard area was on Mr. Hendrickson's property. He said an impact of that flood hazard area would impact Mr. Hendrickson's property.

Attorney Doll said let me ask this, Mark. He asked what you are saying was still included in the mine area was a portion of a flood area, which all though the permit wasn't owned by Mr. Hendrickson but it could impact Mr. Hendrickson...

Attorney Miller stated it would impact Mr. Hendrickson because the map they submitted showed a portion of the flood hazard area was on Mr. Hendrickson's property.

Attorney Doll asked what if the Board, just while they are talking about that issue so you could think about it to address in your summation, what if the Board conditionally approved the application taking into the approval, the finding of fact, that Peabody shall not mine within that flood area in the southern portion. He said the representation was made that was what was going to be true. He stated that Peabody was saying they were not going to mine in that flood area.

Attorney Miller stated he would address that in the summation.

Attorney Doll stated he guessed he was asking why they couldn't just conditionally approve it to address that concern.

Attorney Miller stated he would answer that when they get to their summation but he would like to speak to his client.

Attorney Doll replied sure.

Attorney Miller stated he didn't mean to interrupt him.

Attorney Doll said let him ask this of Peabody so they had all of the... He asked if he had all of that representation, did he understand it correctly in the presentation that they said that they were not going to mine in the flood area at the southern part of the property.

Attorney Sullivan stated without control of Mr. Hendrickson's property they would not be able to mine the southern flood area.

Attorney Doll asked if in fact the BZA conditionally approved the application without that caveat that you would not be mining in the flood area on the southern portion of the property was that objectionable to American Land Holdings or not objectionable.

Attorney Sullivan stated if what sufficiently defined and be specific that extraction, that they weren't pulling coal out of the ground, he didn't want...

Attorney Doll asked what else could be done there.

Attorney Sullivan said if you had, he speculated there, a haul road that goes.

Attorney Doll asked in a flood plain.

Attorney Sullivan said in a (inaudible) that was his initial response.

Attorney Miller stated Mr. Doll that was an excellent question because everyone knows, who lived here in Warrick County, that mining activity ranged from hauling, to blasting, to waste disposal, and to many things. He said they addressed that in very general terms in that petition for review.

Attorney Doll said right.

Attorney Miller stated to focus in on that particular area he would discuss it with his client assuming Mr. Sullivan could do that with his.

Attorney Doll stated he agreed. He said he guessed he would like to know, on behalf of the Board and he would shut up if they wanted him to, but on behalf of the Board, what activities in the southern flood plain would not be essential to the mining application and the SU 13 that American Land Holdings of Indiana was seeking. He asked if he said that correctly.

Mike Winge said it sounded like it.

Terry Dayvolt asked Mr. Doll was it his understanding that if the flood plain was not there they would not even be involved in this.

Attorney Doll stated Terry, we only have jurisdiction, and the Indiana General Assembly with its infinite wisdom took zoning controls off mining activities in the State of Indiana except in two circumstances. He said one was that the permitted area being requested for mining contained a flood district. He stated this one did. He said in the two areas that were discussed at the presentation, the very southern part and northeastern quarter. He stated the other one was if the mining activity was going to occur in an urban area, which the legislature had defined as any parcel of property adjacent to the mine site, or in the mine site that contained eight or more residences within a quarter square mile. He said that didn't apply here, however it may apply in another pending application for an SU 13 that the Board did have in Warrick County at this time. He stated

those were the only two circumstances that this Board had jurisdiction to consider a SU as a precondition to mining activities in Warrick County.

Terry Dayvolt said so if the flood plain were not there the Board wouldn't even be addressing this situation.

Attorney Doll stated there were two ways the flood plain wouldn't be in here. He said one was that it was carved out of the mining application and submitted to Warrick County for approval for a SU 13, which correspondingly should be carved out of the application for the DNR. He stated secondly if in fact they did a LOMA, which was a map amendment where you could prove that the current flood plain map wasn't accurate or applicable in this area and it wasn't really a flood plain. He said there was a process by which you do that. He stated it was time consuming and you had to have engineer's reports that were submitted to DNR for their approval then ultimately they reconfigure a flood plain map if they could be convinced it really shouldn't be including this parcel of property and carve that out of the flood plain. He stated then the Board would lose jurisdiction.

Terry Dayvolt said so the Board would have no jurisdiction if that were not there.

Attorney Doll replied yes. He said he was sorry he just felt like they should get that on the table to figure out where they were going if you don't mind.

Attorney Danks stated if he may as far as environmental concerns it wasn't just wildlife but it was really specifically relates to the flood plain and how that would in turn affect the water quality of the surrounding areas like Pigeon Creek, its tributaries, and other streams. He said so one of the reasons it would be prudent to wait on the State would be if they determined the change was significant or even insignificant the mine plan what happened inside the permit area. He said the activities that would take place maybe even particularly in the flood plain itself might have to be revised. He stated things such as how water would be diverted, where water would be stored, and without knowing if that was safe. He said you brought up yourself, how would the Board even know what was necessary to have in there. He stated they couldn't know that until they had given them a complete plan approved by the State where they actually know what was happening in the flood plain. He stated right now we don't know. He said until they had revised and updated the measures that specifically relate to water quality and how it would be handled and the risks would be minimized or mitigated.

Attorney Doll asked if he would agree that the six factors that the Ordinance that this Board had the authority to consider on a SU 13's are six factors not considered by DNR in their review of the mining application. He said these are all specifically local, did it match the County's master plan for development, was it in harmony with the land use plan, was it a public convenience of welfare for the local community, was it a hazard to vehicles, and etcetera. He stated these are very local questions.

Attorney Danks replied if he might.

Attorney Doll stated here was the essence of his question, the other issues that were addressed tonight, not only are they not in the Board's six elements, they are specifically within the consideration of DNR in reviewing any and all mining applications submitted to the State agency responsible for regulating that. He said here was his question. He stated what if the Board decided okay; even though they aren't in our ordinance, they were going to think about those things, they were going to think about environmental issues, endangered species, habitat, or water quality etcetera. He said they have incongruent decisions where the Board said okay we don't think this was going to be that big of a negative impact, the Board. He said then DNR said whoa wait a minute they did think these would negatively impact. He said now what do they have, who is right, who had authority. He said they couldn't mine with a permit from DNR; statutes say so and federal law said so. He stated so the Board's approval was somewhat irrelevant on those issues. He said unless DNR stopped them, amended them, required them the Board's decision about those elements that were within the permit application regulations at the State level and the Federal level, wasn't the Board superfluous to those decisions.

Attorney Danks well it falls directly...

Attorney Miller interrupted no.

Attorney Doll said okay.

Attorney Miller stated what Jonathan had been talking about were the impacts to the public convenience and welfare.

Mike Winge said that was the number one on their ordinance and he was fixing to address to that.

Attorney Danks agreed yes.

Attorney Miller stated yes, it was absolutely related to that.

Mike Winge said he had a question on that. He stated his question was that since they were talking about a flood area, that they answer the question. He said he was a little familiar with mines, he said he didn't know whether they had the slack to store or what have you. He said if they had that stored then would it not overflow. He said he would like that answered from them. He said that was what he wrote down before they mentioned that. He said that was the question he had. He asked if Attorney Doll was following him with that.

Attorney Doll stated yes, the Board should ask every question they wanted the answer to.

Mike Winge said okay it was their turn (referring to Chad Sullivan and Peabody Mine).

Attorney Sullivan asked were they ready for the rebuttal or...

Attorney Doll replied that was up to remonstrators. He asked did they want to hear it now.

Attorney Miller said he would like for them to answer the question now but they were not finished with their presentation.

Attorney Doll replied okay let's give them the floor.

Chairman Valliant asked so what was the question.

Mike Winge stated the specific question was if they were mining and digging coal, then they would have waste or slack or whatever they were going to store which would call for containment. He asked what kept that from getting into the low lined areas they had that could come into the other areas. He added how that was handled in that regards, because he had seen years past were they pushed all of the sludge in a pit and it would be contained. He said they were talking about a flood area where it could possibly get out. He said the only thing he saw was what Morrie was talking about and that pertained to number one. He said he would like someone to explain to him in regard to that.

Andy Nelson, Permit Manager for Peabody, came to the stand to answer the question. He said the DNR permit application specifically looked at coal refuse disposal areas and any that were proposed they would be addressed by disposal cover and location in relation to flood plains or watersheds. He stated those were always took into consideration in that plan. He added their finding was made in the DNR permit in regard to probable hydrologic consequences of those mining actions. He said it was pretty specifically looked at in terms of refuse disposal if that was the question. He said they looked at slurry and fine course refuse.

Mike Winge said you stated they looked at it, but his question was that he knew there was a lot of that to store and there could be a tremendous amount of that. He stated since it was a flood plain and not like normal then convince the Board that they would not end up in their water if they were over these areas. He added that was a low lined area to begin with and if they had massive rain or flooding what would they do specifically. He said he knew they had talked with DNR but he was trying to understand because he was somewhat familiar with that. He said he just wanted to know that it wasn't going to go where it shouldn't be going.

Mr. Nelson replied in regard to fine refuse, in which you called sludge or slurry, those disposal areas were specifically permitted in the permit and they are strictly regulated in terms of...

Mike Winge asked above or below the flood plain.

Mr. Nelson replied they were not allowed in a flood plain.

Mike Winge asked so it would be stored elsewhere.

Mr. Nelson replied yes, in fact the permit they had did not show any disposal down there in the flood plain.

Mike Winge asked so they could show the Board where it was on the map and where they were going to store this.

Mr. Nelson stated yes it was actually clear up by Lynnville area, Wild Boar, where the current refuge was at.

Attorney Miller said there was a part of their permit area that they hadn't gave to the Board, and it was a band of a roadway from High Point Mine to the old Temple and that facility up there. He said it was in thier permit area but they had not put that in front of this Board.

Doris Horn asked on the flood plain there, how many acres of actual water was on Mr. Hendrickson's property.

Mr. Nelson replied the flood plain was a very small tip of the flood hazard zone, it was very small that extends on Mr. Hendrickson's property.

Doris Horn asked so if they mine this area are they going to go ahead and, like some other mines that were close to where she lived, were they going to build a lake next to it to retain the water or was it going to go into the other water way.

Mr. Nelson said the drainage control plan was also very specific in the permit application and they were regulated under the NPDS permit, discharge permit with the Department of Environmental Management. He stated those drainage plans were specifically reviewed and if they were revised they would accommodate and change in the mine plan. He said they would be specifically reviewed by the DNR hydrologist if Peabody were to move an outfall, a regulated outfall, it would have to go through the Department of Environmental Management. He stated they were regulated under their discharge permit and they were regulated under their mining permit with regard to discharge of surface runoff from the effected mine area.

Doris Horn asked may she ask one more question before she forgets. She asked when they are mining this property, let's say they go ahead and mine down here (referring to the map), are they going to have a wash plant. She asked did they still have a wash plant. She said she knew they did back in the old days.

Mike Winge stated that was his next question.

Mr. Nelson replied the whole processing area for the High Point mine was in place and existed up at the old Lynnville Temple. He stated it was the called the Wild Boar.

Doris Horn said she was always told that water just kept going all the way through any stream possible.

Mr. Nelson said well, again discharge from the plant and discharge from that area was strictly regulated under their NPDS permit through the Department of Environmental Management. He stated they had to monitor that on a regular basis and report that to the state agencies.

Chairman Valiant said that was also outside their Special Use permit application area.

Doris Horn asked what he said she could not hear.

Chairman Valiant restated that was outside their Special Use application area that they were discussing.

Doris Horn said she was just wondering because it did have a flood plain there and if they had a wash plant was there anyway it could get into Mr. Hendrickson's area of water.

Attorney Sullivan stated all of this was in the permit from DNR and all of the paper the Board has on their desks times multiple factors would be the permit. He added they could provide that to the Board which would have all of the plans that had went forth before the DNR as an application and were approved by the DNR.

Mike Winge asked who exactly monitors that.

Attorney Sullivan asked which part.

Mike Winge asked did DNR come down and monitor that, or do they monitor it themselves.

Mr. Nelson said they had to monitor it and report to IDM and DNR went out there on a monthly basis also sampling to some extent.

Mike Winge asked were the reports checked by them and...

Mr. Nelson said by the Department of Environmental Management.

Mike Winge said okay.

Mr. Nelson said DNR was copied as well.

Attorney Engleman stated when the permit was revised...

Chairman Valiant interrupted can they finish his questioning and then the Board would allow him to get back up and rebut.

Mike Winge asked so all of the storage of the sludge would be done up at the old Temple.

Mr. Nelson said presently there was a Life of Mine disposal area to the South East of the Lynnville interchange.

Mike Winge asked was that adequate to handle all of that.

Mr. Nelson replied yes, for right now.

Mike Winge asked right now. He said does that mean one year, two years.

Mr. Nelson said no, ten years

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Mike Winge stated ten years, okay.

Mr. Nelson said it was a huge disposal area out there.

Attorney Miller said he would like to ask a question, what happened if Southern Hills...

Attorney Sullivan said no, the Board could ask questions but they were not doing cross examination.

Chairman Valiant asked were there any other questions from the Board for Mr. Nelson.

Doris Horn asked where they would be getting their water source from.

Mr. Nelson said the main water supply for the Wild Boar wash plant, which was currently out with the processing site, was a complex of old pits that were up there around the old plant and it was basically, to some extent, a closed circuit system. He stated they just recirculate the water.

Mike Winge asked was that when it got dirty enough to turn it into the black sludge.

Mr. Nelson said well the slurry he was talking about was the fine refuse that would be washed off the coal and that water would have to decant through a sediment basin which was monitored, or it would have to be recirculated or go through a circuit system. He added it would go through all the parameters set by the NPDS permit.

Mike Winge said he was familiar with that.

Chairman Valiant asked any other questions from the board for Mr. Nelson. He stated alright.

Attorney Danks stated when the permit was revised, which was the revision that was subject to the litigation that they were currently involved in, it entailed dramatic changes to the drainage control plan and to the way the water was moved around and through the mine operation itself. He said so although they were saying that it did have to meet state regulation in the way that it would be treated but it was how it would be treated how they would accomplish those standards for that matter. He said until they had a finalized mine plan that had been submitted to the state and approved they do not know how the water would be handled. He said the Board asked where the water comes from and where it goes. He said they don't have a final answer on that right now and that was one of the reasons they should wait for the state who have the specialists and the staff to come in and determine that. He added once they were looking at the final mine plan and the drainage control plan they need to know where the water will be disposed or stored and that they had determined it was safe. He said then it would be prudent to say well now the Board knows that the toxic waste would not end up in the flood plain and thereby all of the connecting waterways in the county. He added until that was done they have an unknown risk that it would contaminate the waterway.

Mike Winge said he needed to ask a question on that because if they were using a previously used storage site then he was assuming that that was all pumped through lines and recirculated when it

came down. He said that was contained because he has seen it in operation. He said so if they were getting their water and they were using it and it is going through an already approved site that had been used then that in his mind would answer his number one question, for the welfare. He said his concern was where they got their water and when they were washing it where this stuff would end up. He added it was going where it had been going previously, if he was understanding this all correctly.

Attorney Danks said if he was understanding it was that because the water would end in the same area where it had been deposited before that the Board's concerns were addressed. He stated a key part of that was really the method of transportation, the water runoff during the mining operations, how the existing streams would be diverted to ensure they don't end up washing run off into other water ways. He added it was extremely technical and he was a layman to this type of material. He said a lot of his understanding he had learned specifically for this permit but when they do these drainage control plans they look at existing water structures on Big Dittney Hill, and when they start to mine, and how the water would be moving. He said they would have to make specific changes to existing waterways to make sure that no toxic material or acid water ran into the flood plain or other streams and tributaries that would then connect to the flood plain.

Mike Winge said he guessed he was at a loss. He said if they were going back to the same place that they had been using and it was a contained system and it was there and been used for years. He said he had grown up around this all of his life, he had seen it. He said he guessed the part he was concerned about he was no longer concerned about on number one. He said they are talking like it would go everywhere and if it had been used and it was tested unless they had a problem with it somewhere they could document he didn't see that being an issue.

Attorney Danks said they didn't know if there was a problem somewhere they could document.

Mike Winge stated they should know from all of the previous work.

Attorney Danks said he was sorry if he meant where it was deposited he was not aware of any issues as to where that water ended up. He said the old stripper pits had been refueled with the water. He stated he did not know of any specific concerns with those but it would be the water getting there and how once the mining operation began there was a significant amount of water being used during the mining operation. He added rainfall and the natural ways water moves in the area that they had to control to make sure that the water quality wasn't contaminated. He said it was not just, where the water ended up it was determined by as the entire process moved the water was controlled for all operations. He stated that was what he was really trying to stress right now.

Attorney Miller stated he wanted to clarify they were talking about the water displacement in the mine permit area they presented. He said they were talking about a wash plant and how that water was treated up near Lynnville. He said if that was what they were there arguing about then he would absolutely agree that what they were saying had no impact, but they were talking about the way the operations plan had changed multiple times and it had effected the way the water would be handled on the site. He said they were talking about Big Dittney Hill, which was about 605 ft above sea level at its tallest and was about 400 to 450 ft at the bottom. He said there were numerous

streams on that hill that were natural and high rain seasons that were coming down and were going into the tributaries toward the river. He added they fed into the Pigeon Creek, it fed into pretty much all of the water ways and flood hazard areas south and southwest of this area. He added they had changed that, they changed the way they were going to mine. He said they are contending with the Department of Natural Resources, or the Natural Resources Commission, that it was a material change and not a nonsignificant change. He stated it was one that should have been studied by the hydrologist, by the right departments. He said if they prevail on that then there would be a new study that would be done that addresses that concern.

Attorney Danks asked any questions.

Chairman Valiant asked do they have another presentation as well.

Attorney Miller responded yes, their last presenter was Mr. Hendrickson and he would come up and speak about the property and his use of the property as well as others use of the property.

Mark Hendrickson said ladies and gentlemen of the Board thank you for indulging in him for a couple of minutes. He said he didn't know how many of them were actually familiar with the area. He said let him take just a moment to describe it to them, it was essentially a square mile of just heaven that he had enjoyed since he was about five years old. He said this property had been in his family since the 1940's and it had been enjoyed by now his son, the third generation, as well as all of the people that were members of his club that he had maintained up there for more than 25 years continuously. He stated it was an area of old growth trees, and as Mr. Miller described to them it was the second highest point in the county. He added they could see Alcoa, they could see Evansville from there. He said he thought Mike knew that area a little bit. He said it was a gorgeous area, it was a place to be enjoyed. He said he had enjoyed it and so had the scores and scores of other people that had been members throughout the years. He added some had been members for the entire 25 years. He said he had maintained his club, he had hunting up there, four wheeling, horseback riding, camping, picnics, he had a shelter house up there for people to enjoy, he had approximately 13 miles of trails he had maintained throughout the property for four wheelers. He said it was a place he went very often and he enjoyed it a whole lot. He said as much as the coal mine would have him surrounded on all four sides he thought he adequately qualified for a surrounding area under the second of the six criteria. He said it would absolutely end their use and enjoyment of the property. He said it would end the club he had maintained, had more fun than they could imagine through all of the years. He added it would effectively end his enjoyment as well as all of the others who had use of the property that was an adverse effect. He stated no it was not 350 miners, but it was people that were from there in Warrick County. He added no, he didn't have a website and he didn't advertise because he didn't need to. He said all through the years he had an extensive waiting list, and still do, of people who want to be club members up there, because there were so precious few places left for them to go and this was one of them. He said if this was destroyed there was no other place for him to go. He said he would like for them to take that into consideration as one of the six points that Mr. Doll amply pointed out was the criteria for the Board's decision. He asked that they gave the process a chance, let the experts at IDM and Department of Natural Resources reconsider the application as they had granted them a hearing to do. He said then they could come back and sort that out if necessary. He added thank you very much.

Attorney Doll asked Mr. Hendrickson could he ask a question. He continued he was looking at the maps that his council provided them and was the property the “L” shaped property in Section 36 of the township.

Attorney Miller stated Mr. Hendrickson did not have a copy.

Attorney Doll said he could look at his. He added he was trying to discern was it the light colored “L” shaped piece of property, was that what they were talking about that he owns.

Mr. Hendrickson stated together with the roadway.

Attorney Doll asked that would get him to Greenbriar.

Mr. Hendrickson said yes.

Attorney Doll said okay, so the mining permit and the application for the SU-13 surrounded you on all sides.

Mr. Hendrickson said correct.

Attorney Doll stated it looked like the water that was the flood plain area drained away from his property to the South. He asked would that be accurate.

Mr. Hendrickson replied he believed that would be correct. He added the elevation gain was to the north.

Attorney Doll said yes.

Mr. Hendrickson added generally speaking.

Attorney Doll said so there was a slight little tip of the flood plain that crossed the boundary line onto his property from the South.

Mr. Hendrickson said it actually crossed his access road.

Attorney Doll said okay, but the flow would be away from his property in that flood plain. He asked was that accurate, and he asked to be corrected if he was wrong because he was just trying to look at his map and understand what it depicted.

Mike Winge asked was he above it.

Mr. Hendrickson said he was above it in general, yes sir.

Attorney Doll said okay, thank you.

Chairman Valiant asked for any other questions. He asked are they finished or do they have any more presentation before he opened the floor to anyone else.

Attorney Miller stated that was all they had.

Chairman Valiant replied okay, thank you. He asked if any other remonstrators for or against this project were present. He said he would state again please do not be repetitive. He continued seeing that there were none he asked the board for any questions on anything else.

Attorney Sullivan asked may he address a few of the things they spoke on.

Chairman Valiant said yes, he was sorry he was getting ahead of himself.

Attorney Sullivan stated he would do something that would often be difficult for litigators. He said he would be brief and attempt to be practical. He added the reality of the situation was Peabody was not going to mine on Mr. Hendrickson's property: unless it had the DNR permit, unless it had the Special Use permit, and it had some type of property right to mine this property. He added so when counsel made the statement of if they do not deny this there would be nothing to stop them from mining that was just not accurate. He said there were multiple steps that Peabody had to go through before they could mine Mr. Hendrickson's property. He said as far as the delay question, again to be practical, if the DNR somehow changes, and again to be clear there was a final permit in place to mine the property that was included in the SU-13 application. He stated they had filed what they believe was an untimely objection trying to open it back up and they were going to get a hearing on that, however there was a final permit in place. He added if the DNR changed that then Peabody cannot mine and they won't mine, but there was no reason to delay the issuance of the SU-13 on different factors than what the DNR was going to hear. He said all they were trying to do was get two bites at the apple that was why the Board had heard all the DNR arguments there tonight. He said almost everything they had heard was there argument that they were going to make to the DNR. He stated there was really no basis to give them two bites at the apple or to delay the Board's consideration of the petition that was in front of them. He said he wanted to answer one question that was posed, he thought by Mr. Doll, about the amount of flood plain it was approximately .34 acres of the flood plain was on Mr. Hendrickson's property. He added the map he had provided the Board was a topographic map so they would have the actual elevations on that map to show them everything was draining away from his property. He stated again, their contention was all of the DNR arguments they had heard were improper for the Board. He said however they did not really hear any evidence of any potential problems, they just heard what ifs and blind speculation. He said he would contend that if they were to consider that it would not be sufficient to deny their properly submitted petition. He stated those were the few things he thought needed clarification or answering so if there were any further questions he was happy to address them.

Attorney Doll stated he had asked whether the applicant would support a conditional approval that precluded mining activity, let him use that phrase, which should be under his understanding a DNR permitting all-inclusive of the activities associated with that. He added not just extraction, but other activities as well. He said his other question was what says the applicant about a conditional approval that says, and now that he had this map, south of Mr. Hendrickson's property mining

activity would not occur within the permitting area. He asked had they made a decision about whether they could agree to that or not.

Mike Engleman, Director of Continuous Improvement at Peabody Energy, started to respond.

Chairman Valiant said sir, come on up to the podium please.

Attorney Doll stated that was something the Board needed to hear if that was something they could or could not or would or would not agree to.

Mr. Engleman said as far as the condition south of the Hendrickson property there was an existing final cut full of water currently and final cut lake with an existing endowment of water that they would possibly use as part of the mining activity as sediment control into that. He said it would not be coming off onto Hendrickson obviously but it would be coming from the west and/or to the east draining to the south into that. He said he knew as far as conditions go they could not have it specific to any activity. He said he thought that would be hindering them.

Mike Winge asked so they are saying they would use that as a holding basin for certain runoffs or whatever.

Mr. Engleman replied as part of their approved way that they do clarify and treat the water from the mining operation yes. He said they would have the sediment fall into that.

Mike Winge asked was there a damming process for that. He said that was a large...

Mr. Engleman stated it was all inside, it was all below. He said there was no dam it was below ground basically, it was below the topo.

Attorney Doll asked did it flow into the flood plain.

Mike Winge stated that was a big area of water.

Mr. Engleman replied no, he didn't think so. He said he did not believe it flowed into the flood plain, and again the flood plain maps were created in the 1950s or 1960s he wasn't exactly sure but it was obvious to him they were established before mining had occurred out there.

Mike Winge asked now would that body of water extend outside of the actual whole mining area, or was it well within the boundaries of their mining area, all aspects of it.

Mr. Engleman said yes, everything to the south was to a point.

Attorney Doll asked to Greenbriar.

Mike Winge asked if it was the blue area then some of that would be outside of their mining permitted area right.

Mr. Engleman replied yes.

Mike Winge asked so they would have the runoff going out there.

Mr. Engleman replied after it was treated and passed through an NPDS outpool point that they had described that they had to pass. He said yes it would have to go through there, it would have to go through some sort of structure to let it settle, let it clarify, to get to a standard where they could release it based on their permit.

Mike Winge stated well that would be going over into other areas.

Mr. Engleman said possibly yes.

Mike Winge said somebody else would have to worry about it.

Mr. Engleman stated he didn't understand the worry about it, if it was already going there it was going to go there they were just clarifying it so it could continue to go there.

Mike Winge asked so there was nothing else to go in there besides normal water runoff.

Mr. Engleman replied exactly.

Mike Winge said okay. He asked so no contaminants or anything else would be in there.

Mr. Engleman replied not off site, no.

Attorney Doll questioned were they going to put overburden in there. He asked were they going to put fines or something in the pit aren't they.

Mr. Engleman replied sediment, sediment control when they effect it and turn over the ground yes there was going to be, with rain coming down, there was going to be drainage that came off where they had affected the dirt and the soil.

Mike Winge asked like muddy water.

Mr. Engleman replied yes, like muddy water that came off agricultural fields.

Mike Winge asked so they were not talking about coal sediment or whatever.

Mr. Engleman said no, no, no.

Mike Winge said okay, so just ground disturbance.

Mr. Engleman said yes.

Mike Winge said okay.

Attorney Doll said thank you.

Attorney Sullivan asked any other questions for them.

Terry Dayvolt asked had they obtained mineral rights to all the permitted area that they had.

Attorney Sullivan asked could he say that again he couldn't hear him.

Terry Dayvolt repeated had they already obtained mineral rights to all of the permitted areas, or all the yellow area.

Attorney Sullivan asked all of the area in the Special Use permit.

Terry Dayvolt replied yes.

Attorney Sullivan said he would refer to David. He asked do they control everything that was in the Special Use permit, now that they had carved out Mr. Hendrickson.

Mr. Engleman replied yes, everything except for Mr. Hendrickson's.

Attorney Sullivan said which was now not part of the SU-13. He said he guessed one additional point, for clarification, counsel said that they cut that out to undermine the standing and that was not the case. He said they did it because they thought it addressed his concerns. He said he came to them saying he was concerned they were going to mine through him anyway and so they carved him out of the Special Use permit in hopes of allaying his concern that they were going to do that. He added so that was why they did the amended petition, in hopes of resolving the matter and it was unfortunately unsuccessful but that was the reason why they pulled him out of the Special Use permit. He said if there were no further questions then thanked them for their attention and time.

Attorney Miller asked Mr. Doll may they make two statements.

Attorney Doll said that was up to the...

Attorney Miller asked Mr. President.

Chairman Valiant said yes.

Attorney Miller said he thought someone would like to be heard other than himself and Mr. Danks. He said the only thing he wanted to do was respond to something that Mr. Sullivan said and remind the members of the Board of something he said in his initial presentation, which was that they should defer to DNR. He stated that was a key part of what he said, that they should defer to DNR and in his closing he said the DNR stuff really doesn't matter and that it was not important. He said they submit that it was very important and they ask that the Board consider it.

Attorney Danks stated he would like to emphasis on the testimony they had just heard about some of the mining operations that would specifically take place in the flood plain and the water ways

that would be connecting to the flood plain. He said the overburden refers from the top soil to the coal and when the permit was approved state specialists ran tests to ensure that there was nothing in that section of the ground, that when exposed could be toxic. He said toxicity could just be a high acid content in the soil that wind spread through the waterway. He said it could be toxic to life. He stated the Board just heard them tell the Board themselves that the mining operations would directly impact the water in the flood plain and so until they could be sure that there was no danger or any kind of toxic material being dumped into waterways that would then spread into the other Warrick County streams, tributaries, Pigeon Creek. He said it would be prudent for the Board to wait for DNR to make that determination, thank you.

Chairman Valiant asked did someone else want to speak now.

Lisa Harris came to the podium. She stated good evening everyone she had come there to listen tonight and had no intention of speaking about anything, but as she sat there and listened to this as a member of this community, as a daughter of a man that had been in the community for 80 years. She said she had an entire family there and it occurred to her that, she kept hearing what ifs don't matter from the side from the coal mine. She said she certainly understood the coal mine industry as far as what it had brought to the community as far as wealth to the community through the years. She said what ifs do matter though; if this would wind up in their water supply and she just didn't understand what a slight delay would cost if it meant their public welfare which is part of the Board's decision meeting. She said while she didn't understand a whole lot as far as the DNR and the permit process and this and that, she did understand that it was important to their community to stay healthy. She said it sounded like they were sacrificing that if they made a decision without any kind of delay that might impact all of the community, and the health of our families, our children, and our grandchildren. She said she just felt that was something important to express on behalf of the citizens. She said thank you.

Chairman Valiant said thank you ma'am. He asked any questions from the Board.

Jeff Willis asked when they planned to begin extracting if this would be approved.

Mr. Pierson said their plan was to move over there in January of 2020 they planned to start stripping topsoil and getting materials.

Jeff Willis asked so not before November 29th of this year.

Mr. Pierson replied no.

Attorney Doll said that was a prehearing conference.

Chairman Valiant said that was what he was going to ask.

Attorney Doll said that was not a trial on their application and petition for review. He said that was just notification from the commission of a prehearing conference for future dates and deadlines for pleadings, mediations...

Jeff Willis asked so they could put a stop to their permit at that point, if they thought it was significant.

Mike Winge said they already had a permit on file.

Attorney Doll said no due process requires there to be a hearing unless it was dismissed by some sort of dispositive motion in between now and the hearing. He explained this just said the judge would hear both sides to determine deadline dates for pleadings, documents witness lists, contentions, and dispositive motions. He asked did anyone think this would be decided in 2019.

Attorney Miller said yes he did.

Attorney Doll said okay that was their answer. He said sometime next year this may be decided.

Mike Winge asked now did that affect the Board on their points.

Attorney Doll replied he did not think that affected that. He said it did not tie their hands to where they could not approve the SU-13 if the Board chose to do so.

Mike Winge said let him ask one more question. He asked if the Board approved it, hypothetically they approved it, and they were not going to start anything until 2020 and something came up then DNR would change that there wouldn't they.

Attorney Doll said he did not understand the question. He said if something came up, he didn't know what that meant.

Mike Winge said well let's just say they had their hearing and they found a problem down there or whatever they're not going to be mining for...

Attorney Doll said before the applicant could start moving dirt it would take two things: it took approval of the final mine permit by DNR after the hearing had occurred in Indianapolis and it took an SU-13 in Warrick County. He said only when both those criteria, and they had to own the rights to the minerals of the subject ground.

Attorney Sullivan said not to cut to the final point, but they had already received the final permit. He said they had filed what they consider as an untimely objection and they were trying to overturn that, but there was a final permit in place and effective as we speak.

Attorney Doll asked from three years ago.

Attorney Sullivan answered with some revisions in between, but yes there was a current permit in place.

Mike Winge asked but that could still be updated up there.

Attorney Sullivan said yes DNR had authority to address permits with or without objections filed.

Attorney Doll stated on an ongoing basis.

Mike Winge asked so if the Board passed it or didn't pass it it was still going to be...

Attorney Doll said what the Board did would not have any influence up there.

Chairman Valiant asked any other questions from the Board.

Terry Dayvolt asked how many tons of coal they projected to take off this ground.

Mr. Pierson stated their projection with their current geology is around about 15 million tons right now. He added those are clean tons.

Terry Dayvolt asked 15 million.

Mr. Pierson replied yes.

Mike Winge asked so this was ongoing for the jobs that were already created. He added this was a tough decision. He said he wanted to address the young lady who came up. He said he lived here all of his life and he had grandkids. He said they were all thinking about that and he knew most of them out there, but the Board also looked at jobs and all of those types of things. He said it was kind of hard to make a decision on these things. He said they had to look at jobs and the other side of that was, as Morrie said, they had to look at what their requirements were and he really didn't see this as one of the steps they look at. He said he thought if they were going to run into a problem it would be up there between you all before it would be all said and done.

Chairman Valiant asked anymore questions from the Board and if not what were the Board's wishes.

Jeff Willis said under number 2, the adjacent property owner value, if he was deriving value from the neighbor's property being beautiful and they came through and cut all the trees anyway even if they couldn't mine it how did they deal with that. He said it would not be hurting his value because it wouldn't be his property but...

Attorney Doll asked were you saying...

Jeff Willis asked did he have the rights to the view if it was already there, but he didn't own the land that was already there.

Attorney Doll answered each of them have the right to use their own land as legally permissible according to the zoning laws and state regulations applicable to the property. He said he didn't have a right to have an expectation to make his neighbor keep a view that he finds pleasing, unless somehow or another he had purchased that right by easement or acquisition. He said so theoretically the mine could surround this property and be a typical strip mine environment and they all know what that was like, they had been there each of them, he would think. He said they couldn't cross on to Mr. Hendrickson's property but they had the right to use the property

according to the approved permit by DNR. He added that may mean they could remove all the vegetation. He said removing vegetation creates runoff among other things and he was sure those questions would be asked to be addressed in the mine permit application. He said aesthetic points of view would not be in the germane area of their regulation.

Terry Dayvolt asked how many other land owners were in this project.

Attorney Sullivan said all of them were listed in the notice which was on tab...

Mrs. Barnhill stated they had 25 surface owners.

Terry Dayvolt stated 25 surface owners that they had rights to mine their property to.

Attorney Sullivan said that sounded correct.

Terry Dayvolt asked what kind of royalties they were paying these people to take off 15 million tons.

Attorney Sullivan replied he did not believe those were all the same and generally that was considered proprietary information. He added he didn't believe there was one answer to that.

Terry Dayvolt said one dollar a ton.

Attorney Doll said he didn't believe that was relevant to the application.

Terry Dayvolt said well if they were looking at esthetics and things like that...

Attorney Doll stated they were not.

Terry Dayvolt said he knew they weren't, but that was what had been proposed to them. He added he understood those things but what about the 25 other landowners; where were they.

Attorney Doll said the private contract rights between the land owners and what they may have negotiated with the mining company was a proprietary fact strictly between the land owner and the mining company.

Terry Dayvolt said he understood that, he was just wondering where they were...

Attorney Sullivan said he was planning on bringing two others. He said Mr. Scales was going to come but broke his ribs. He added they could have inundated the Board with 25 land owners but they, like he said at the beginning, were trying to be somewhat efficient with their time and theirs. He said Mr. Weyerbacher could come up and tell the Board why he was there in support. He said he would not imply that just because they did not round up all 25 to come that they were not in support of the application and getting paid their royalties which they were in favor of. He said he did not believe that was a fair assumption.

Terry Dayvolt said he was not assuming that but...

Chairman Valiant stated 25 people were given noticed and they only had one show up. He said he thought that was the point he was trying to make.

Terry Dayvolt said well when looking at that he knew there would be a monetary gain for those people and...

Mike Winge said that wasn't even the issue, it shouldn't be.

Terry Dayvolt said he knew and he understood that. He said he wasn't leading to that he just...

Chairman Valiant said again, remember they were only there because of the flood plain.

Ascertaining no further questions from the Board the Vice Chairman called for a motion.

I, Mike Winge, make a motion finding of fact be made as follows from the testimony and proposed use statement:

1. The USE is deemed essential or desirable to the public convenience or welfare.
2. The USE is in harmony with the various elements or objectives of the Land Use Plan for Warrick County.
3. The USE will not be a nuisance or serious hazard to vehicles, pedestrians, or residents.
4. The USE as developed will not adversely affect the surrounding area.
5. Adequate and appropriate facilities will be provided for proper operation of the USE.
6. The specific site is appropriate for the USE.

And the Application be approved in accordance to the application and plans on file, subject to the following conditions:

- a. Subject to the property being in compliance at all times with the applicable zoning ordinances of Warrick County.
- b. Subject to all public utility easements and facilities in place.
- c. Applicant must be in compliance with all present state and federal applicable statutes and administrative regulations should such statutes or regulations be repealed or weakened in their stringency during the operation of the mining activities the applicant shall remain bound by the provisions as they exist as of this date.

- d. Subject to applicant filing the combination of road use agreements and/or petitions for temporary road closure with the Board of Commissioners and have those approved by said board.
- e. Subject to approval for the application only.

Paul Keller seconded the motion. Motion was carried, five in favor. Doris Horn opposed.

ATTORNEY BUSINESS: None.

EXECUTIVE DIRECTOR BUSINESS: None.

Being no further business the meeting adjourned at 8:03 p.m.

Jeff Valiant, Chairman

ATTEST: The undersigned Secretary of the Warrick County Board of Zoning Appeals does hereby certify the above and foregoing is a full and complete record of the Minutes of the said Board at their monthly meeting held November 13, 2018.

Molly Barnhill, Assistant Director